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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

HEATHER LEIGH BOGGS and MISTY LEICHANN BOGGS b/n/f DIANNE BOGGS ARRINGTON and RICHARD D. BOGGS b/n/f SARAH A CRITCHER,

Petitioners

-vs-

ELTON EUGENE JONES, Sheriff of Troup County, Georgia, TROUP COUNTY, GEORGIA and SHANE MORRIS,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

"PETITION FOR WRIT OF CERTIORARI"

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QUESTIONS PRESENTED FOR REVIEW

I. CAN FAILURE TO CORRECT A KNOWN DANGEROUS CONDITION CONDUCIVE TO SUICIDE AMOUNT TO DELIBERATE INDIFFERENCE ON THE PART OF A COUNTY?

II. DOES DELIBERATE INDIFFERENCE TO MEDICAL NEEDS OF A PRETRIAL DETAINEE/SUICIDE VICTIM REQUIRE THAT THE JAIL OFFICIALS KNOW THAT THE DECEASED WAS A SUICIDE RISK OR IS DELIBERATE INDIFFERENCE TOWARD THE ENTIRE CLASS OF SUICIDE RISKS COUPLED WITH PROXIMATE CAUSE SUFFICIENT TO HOLD THE SHERIFF AND COUNTY LIABLE UNDER 42 U.S.C. §1983?

CERTIFICATE OF INTERESTED PARTIES

Heather Boggs b/n/f Diane Boggs Arrington

Misty Boggs b/n/f Diane Boggs Arrington

Richard D. Boggs b/n/f Sara A. Critcher

Elton Eugene Jones, Sheriff of Troup County, Georgia

Shane Morris, Jailer of Troup County, Georgia

Troup County, Georgia

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Petitioners

VS.

ELTON EUGENE JONES, Sheriff of Troup County, Georgia, TROUP COUNTY, GEORGIA and SHANE MORRIS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Heather Leigh Boggs and Misty Leighann Boggs b/n/f Dianne Boggs Arrington and Richard D. Boggs b/n/f Sarah Critcher pray that certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals dated April 21, 1992, affirming the District Courts grant of summary judgment as to Elton Eugene Jones in his official capacity as Sheriff of Troup County, Georgia and Troup County, Georgia is contained in the accompanying Appendix as Exhibit A and is unreported.

The Order of the United States District Court for the Northern District of Georgia, Newnan Division, dated July 18, 1991 is contained in the accompanying Appendix as Exhibit B and is unreported.

JURISDICTION

Judgment of the Eleventh Circuit Court of Appeals was rendered on April 21, 1991. Motion for Stay of Mandate was filed on May 6, 1992.

Jurisdiction of this Court is founded upon 28 U.S.C. 2101(c) and United States Supreme Court Rule 12. Petitioner seeks review of a decision of the Eleventh

Circuit Court of Appeals involving an important question of federal law, the interpretation of which has created a split of authority among the circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Fourteenth Amendment to the United States Constitution which reads: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b) 42 U.S.C. §1983 which reads: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

a. Course of the Proceedings

Plaintiffs Heather and Misty Boggs filed their original complaint against the named defendants Elton Eugene Jones, Troup County and Jailer John Doe, as well as each commissioner of Troup County, Georgia in his official and individual capacity alleging civil rights violations and various state claims as to the wrongful death of their father, Richard Boggs. (R-1) Before service and filing of the answer, and after discussion with defense counsel, Plaintiffs Heather and Misty Boggs recast their complaint to name the parties currently involved in the litigation, Elton Eugene Jones, individually and as Sheriff of Troup County, Georgia, Shane Morris, individually and as jailer of Troup County, Georgia and Troup County, Georgia. (R-2) The defendants all filed answers to the amended complaint. (R-4)

On January 17, 1990 all parties moved the Court to permit joinder of Deborah Ogles and Richard D. Boggs as additional defendants necessary for just adjudication of the claim and leave to amend the complaint, alleging that through discovery they had determined that Deborah Ogles McCormick was claiming to the be the common law wife of the deceased, Richard Boggs and that Richard D. Boggs was alleged to be the son of deceased Richard Boggs. (R-12) The court granted the Motion for Leave to Amend and Motion for Joinder, (R-13) and the Plaintiffs amended their complaint to add Deborah Ogles McCormick and Richard D. Boggs as defendants in a count for declaratory judgment to declare that Deborah Ogles McCormick was not the common law wife of the deceased and the Richard D. Boggs was not the son of the deceased. (R-15)

On May 17, 1990 Plaintiffs moved for judgment by default against Deborah Ogles McCormick (R-24), which Motion was granted by the Court. (R-25) On October 22, 1990

Richard D. Boggs filed an answer and counterclaim through his next friend, Sara A. Critcher. (R-27) On December 10, 1990 all parties entered into a consent order realigning the parties to their current status as plaintiffs and defendants. (R-29)

Various discovery was conducted by the parties. At or near the end of the discovery period, on April 15, 1991 Plaintiffs filed a Motion for Leave to File their Third Amended Complaint. (R-35) Included in this Motion was the attempt to change the body of the complaint to reflect the cause of action as one sounding in the Fourteenth Amendment rather than the Eighth Amendment as well as an attempt to seek injunctive relief based on the inspection of the premises and report filed by Gordon Kamka, and two other technical amendments. (R-35) Defendants opposed that motion, (R-40) and Plaintiffs filed a Reply Brief to the Defendants' Opposition Brief. (R-41) The Motion for Leave to Amend was denied on July 2, 1991.

(R-48) Plaintiffs filed a Motion for Reconsideration on July 10, 1991, (R-48) which was rendered moot by the Court Order granting summary judgment. (R-55)

On May 6, 1991 all defendants moved for summary judgment on various grounds and included affidavits of Roy Olinger and Elton Eugene Jones with their motion. (R-42) Plaintiffs responded to the motion for summary judgment and filed affidavits of Gordon Kamka and Tony Lollis. (R-45) Summary Judgment as to all defendants was granted on July 22, 1991. (R-50) Plaintiffs appealed the District Court's Order granting the Summary Judgment. (R-54) The opinion of the Court of Appeals affirmed as to Troup County and Sheriff Jones and reversed as to Jailer Shane Morris. From the opinion Petitioner's seek a Writ of Certiorari from this honorable court.

b. Statement of Facts

This is a claim by the children of Richard Boggs, deceased, for wrongful death of their father. Boggs was incarcerated in the Troup County, Georgia Jail where he hung himself from exposed pipes in his jail cell. Boggs death was the fourth in a series of deaths by hanging between 1985 and 1988.

GBI agent Roy Olinger investigated three of the hanging incidents in the Troup County Jail and was deposed by the Plaintiffs on March 18, 1991. Agent Olinger testified as to three incidents of hanging at the Troup County Jail using exposed pipes.

Agent Olinger testified that he was called to the Troup County Jail on January 10, 1985 to investigate the death of Larry Lee Lovell. (Deposition of Roy Olinger, p. 11) Olinger found Mr. Lovell sitting on the commode unit in the cell with a knotted piece of greenish bed sheet around his neck. He found a corresponding piece of bed sheet tied to an overhead pipe protruding from the

ceiling. (Deposition of Roy Olinger, page 12) Olinger concluded that Lovell "used a piece of greenish bed sheet, twisted it, tied it around the metal pipe on the right over the commode, standing on the commode, and had wrapped the bed sheet around his neck and then stepped off." (Deposition of Roy Olinger, page 13) The Lovell cell appeared to be essentially the same configuration as the Boggs cell. (Deposition of Roy Olinger, page 16)

On January 7, 1986, Deputy Mark Chaney reported an attempted suicide of Richard Lankford. Deputy Chaney was deposed by Plaintiff on March 18, 1991 concerning this incident. Deputy Chaney related that he was doing his routine checks when saw Lankford in a "side cell". This cell, similar to the Boggs cell, has two bunks and a commode sink unit. (Deposition of Mark Chaney, page 6) The commode sink was similar to the unit in the Boggs cell. (Deposition of Mark Chaney page 7) Chaney found Lankford hanging from

pipes along the wall with a sheet around his neck. (Deposition of Mark Chaney page 7) At the time Chaney found Lankford, he did not believe Lankford to be alive, and Chaney was uncertain if Lankford had a pulse. (Deposition of Mark Chaney page 8) (Note: the incident report prepared by Chaney stated, "...there seemed to be no pulse ...") Chaney testified that he later felt that this was in fact an escape attempt rather than a suicide attempt, despite his report notations of no pulse. (Deposition of Mark Chaney, page 8).

On May 22, 1987, Agent Olinger was again called to investigate a death at the Troup County Jail. This time he was called to investigate the death of Charles Thomas Smith. Smith was found hanging by his neck from the shower stall in cell number 2, a converted side cell. (Deposition of Roy Olinger, page 7) Smith took his shirt and tied it around the metal bar across where the shower curtain would go and tied the other

end to his neck and stepped off a raised area in the cell. (Deposition of Roy Olinger, p. 10)

Finally, Roy Olinger was called to investigate the death of Plaintiffs' decedent, Richard Boggs on July 6, 1988. Olinger determined that Boggs "had hung himself by the use of a bed sheet that he had twisted to make a rope out of it and hung--wrapped it around the pipe, wrapped it around his neck and stepped off." (Deposition of Roy Olinger, page 19) Tony Lollis, the inmate in the cell across the hall from Boggs heard Boggs request of the jailer to be put in the general population shortly before he hung himself. Olinger reported that Lollis quoted Boggs as saying he was going "crazy" in the cell by himself. (Interview of Roy Olinger, Attached to Defendants' affidavit) According to the affidavit of Tony Lollis, Boggs told Jailer Shane Morris that if he did not get put into a general population cell he would hang himself. Morris told him to go

ahead and do it. (Affidavit of Tony Lollis) (R-45)

Gordon Kamka, a jail consultant, viewed the Troup County Jail on May 21, 1991 pursuant to a Request for Inspection of Premises file by the Plaintiffs. Mr. Kamka testified by affidavit as to the clear and present danger presented by the exposed pipes. Kamka stated in his affidavit as follows: "This danger is so obvious that it should not take a trained jail administrator to recognize the danger. Even the average lay citizen would recognize the danger. This is especially true after this method had been used one time to commit suicide. The exposed pipes can be safely covered at minimal cost compared to the danger they pose. In my opinion, failure to correct this defect after the first hanging was a wanton disregard for the rights of the jail inmates. The exposed pipes continue to pose a danger to the inmate population assigned to the "side cells" and will continue to do so as long as they remain

exposed, regardless of the frequency of jail checks." (Affidavit of Gordon Kamka) (R-45)

In addition to Mr. Kamka's affidavit, GBI agent Roy Olinger stated that he had investigated 25 or 30 hangings over the years. (Deposition of Roy Olinger, page 34) Olinger stated his opinion that "most of the jail suicides are hangings." (Deposition of Roy Olinger, page 35)

Sheriff Jones was asked on deposition if, based on the hangings in a similar manner to the Boggs hanging, he had considered doing anything to "block off the pipes at the top of the ceiling so that sheets or ropes or belts or anything else could not be looped around those pipes?" The sheriff stated that he and possibly the chief deputy "considered" covering the pipes, but they never consulted any contractors to determine what could be done. (Deposition of Elton Eugene Jones, pp. 27-28) Sheriff Jones could not remember if they had discussed this before or after the Boggs hanging. (Deposition of Elton Eugene

Jones, p. 28)

The jail was owned and funded by Troup County and run by Sheriff Jones. (Deposition of Elton Eugene Jones, p. 28.)

STATEMENT OF FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the District Court was based on 42 U.S.C. §1983 and 28 U.S.C. §1331. Jurisdiction of the State claims was based on the District Court's pendant jurisdiction.

ARGUMENT AND CITATIONS OF AUTHORITY

This petition for Certiorari presents two issues for review, which have been ruled on differently by the various circuit courts of appeal.

I. CAN FAILURE TO CORRECT A KNOWN DANGEROUS CONDITION CONDUCIVE TO SUICIDE AMOUNT TO DELIBERATE INDIFFERENCE ON THE PART OF A COUNTY?

The key issue that the Eleventh Circuit failed to address, despite it being briefed by the parties and addressed during oral argument, is whether the failure to correct a known dangerous condition conducive to suicides can amount to deliberate indifference as opposed to mere negligence. Petitioners contend that the three prior hangings or attempted hangings in a same or similar manner were sufficient to put the county on notice that the dangerous condition of the exposed pipe over the toilet unit

needed to be corrected before another life was lost to suicide. Failure to take those corrective measures amounted to a deliberate indifference to the next suicidal inmate housed in one of those cells. Colburn v. Upper Darby TP., 838 F.2d 663 (3rd Cir. 1988).

Instruction can be taken from both pretrial and Eighth Amendment cases since "the due process rights of a [pretrial detainee] are at least as great as the Eight Amendment protections available to a convicted prisoner." Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983). In dealing with pretrial detainees, "it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." Wilson v. Seiter, 501 U.S. ____, 111 S.Ct. 2321 (1991).

As this Court stated in City of Canton v. Harris, 489 U.S. 378 (1989): The "first inquiry in any case alleging municipal liability under §1983 is the question of

whether there is a direct causal link between the municipal policy or custom, and the alleged constitutional deprivation." The policy in this case was to allow the exposed pipes to remain exposed, despite the apparent danger posed by their presence over the sink/toilet unit. The very first hanging in the Troup County jail was in a side cell similar to the one in which Petitioners' deceased was housed. It happened over three years before the Boggs hanging. Despite a total of three hangings in the same or similar manner, the policy remained unchanged.

Applying the analysis used in the "failure to train" context, this Court said, "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of the constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately

indifferent to the need. " City of Canton v. Harris, 489 U.S. 378 (1989). In the case sub judice, the repeated use of bed sheets and the exposed pipes above the toilet as a method of suicide, and the sheriffs conscious decision not to repair this danger amount to a "conscious choice" by the county and thus amount to deliberate indifference, rather than mere negligence.

The Third Circuit has correctly held that this failure to correct the defect in the suicide context can amount to deliberate indifference. Colburn v. Upper Darby TP., 838 F.2d 663 (3rd Cir. 1988); Bielevicz v. Dubinon, 915 F.2d 845 (3rd Cir. 1990).

Other circuits have attributed this refusal to correct as mere negligence. See, Molton v. City of Cleveland, 839 F.2d 240, 243 (6th Cir. 1988), cert. denied, ___ U.S.___, 109 S.Ct. 1345,, 103 L.Ed.2d 814 (1989) (mere negligence despite 8 prior suicides), Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990); Wayland v. City

of Springdale, Ark., 933 F.2d 668 (8th Cir. 1991) (Appellees' failure to change the air vents used for previous suicide could not establish anything other than negligence).

Petitioners believe that the correct position is that failure to correct a known dangerous defect can rise to the level of deliberate indifference. Petitioners respectfully submit that this division among the circuits should be addressed by this Court.

II. DOES DELIBERATE INDIFFERENCE TO MEDICAL NEEDS OF A PRETRIAL DETAINEE/SUICIDE VICTIM REQUIRE THAT THE JAIL OFFICIALS KNOW THAT THE DECEASED WAS A SUICIDE RISK OR IS DELIBERATE INDIFFERENCE TOWARD THE ENTIRE CLASS OF SUICIDE RISKS COUPLED WITH PROXIMATE CAUSE SUFFICIENT TO HOLD THE SHERIFF AND COUNTY LIABLE UNDER 42 U.S.C. §1983?

A second and corollary question is presented by this case. Must deliberate indifference be with specific knowledge of a

likelihood of harm to the deceased, or is a generalized indifference toward the class of potential suicide victims sufficient? The Circuits that have addressed the question posed by this petition divide into two categories. The Eleventh Circuit, along with the First and Eight Circuits have held that a particularized knowledge of the deceased suicidal tendencies is required before the governmental entity can be found to be deliberately indifferent.

The Third Circuit (and possibly the Fifth Circuit) has taken a broader approach. Either particularized knowledge of the suicidal tendencies of the deceased or deliberate indifference to the class of detainees prone to commit suicide coupled with a causal connection between the policy and the death is sufficient to create a jury issue.

The Eleventh Circuit affirmed without comment the granting of summary judgment as to Sheriff Jones and Troup County relying in

a footnote on the case of Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990). In that footnote, the Eleventh Circuit found that summary judgment was proper because "Plaintiffs failed to present any evidence suggesting that the Sheriff should have been aware that Boggs was a suicide risk." Boggs v. Jones, No. 91-8701, Slip Op. p.1, f.n. 1. In this case, petitioners do not contend that Sheriff Jones had knowledge that Boggs was a suicide risk. Rather, they contend that the Eleventh Circuit rule is overly restrictive.

The Eleventh Circuit rule is set out very clearly in Schmelz v. Monroe County, 954 F.2d 1540, 1545 (11th Cir. 1992). The Schmelz Court stated: "No matter how defendants' actions might be viewed, the law in this circuit makes clear that they cannot be liable under § 1983 for the suicide of a prisoner 'who never had threatened or attempted suicide and who had never been considered a suicide risk.' Schmelz v. Monroe County, 954 F.2d F.2d 1540 (11th Cir.

1992). See also, Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990); Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990).

The reasoning of the Eleventh Circuit has been expressly adopted in the Eight Circuit where they stated:

> " Absent knowledge of a detainee's suicidal tendencies, the cases have consistently held that failure to prevent suicide [does not] constitute deliberate indifference." Popham, 908 F.2d at 1564. Because Stigers was not aware that Bell was a suicide risk, his failure to detect or remove Bell's belt does not rise to the level of deliberate indifference.

Bell v. Stigers, 937 F.2d 1340, 1344 (8th Cir. 1991).

Similarly the First Circuit has stated: "The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known of the

detainee's suicidal tendencies." Elliott v. Cheshire County, N.H., 940 F.2d 7 (1st Cir. 1991). Accord, Buffington v. Baltimore County, MD., 913 F.2d 113 (4th Cir. 1990); Belcher v. Oliver, 898 F.2d 32 (4th Cir. 1990); Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989).

In conflict with the Eleventh Circuit is the view of the Third Circuit. Petitioners believe that the Third Circuit approach is consistent with this Court's rulings in this area. The Third Circuit first recognized that a governmental entity could not ignore a known risk and escape §1983 liability. In Colburn v. Upper Darby TP., 838 F.2d 663 (3rd Cir. 1988), they stated:

> However, plaintiff has alleged that Stierheim was the third person to commit suicide while in police custody at the Upper Darby Township police department jail since November 1982. App. at 8. The two prior suicides can be viewed as providing the governing body of Upper

Darby with actual or constructive knowledge of the alleged custom of inadequate monitoring of jail cells.

Colburn v. Upper Darby Tp., 838 F.2d 663, 672 (3rd Cir. 1988). In providing interpretation of Colburn, the Third Circuit stated:

> Furthermore, in Colburn v. Upper Darby Township, 838 F.2d 663 (3rd Cir. 1988), cert. denied, --- U.S. ---, 109 S.Ct. 1338, 103 L.Ed.2d 808 (1989), we held that a municipality's failure to act, once it was on notice that its procedures were constitutionally deficient, created a fact question respecting causation. The plaintiff, in Colburn, sued the township under § 1983 claiming that the township's "custom of laxity" in supervising jail cells and in searching individuals taken into custody was the proximate cause of a detainee's suicide. Plaintiff further asserted that, because the decedent was the third individual in recent years to commit

> suicide while in police custody, the township was on notice of the inadequacy of its detention procedures. Relying on the township's inaction in the fact of two prior suicides, we held that the nexus between the township's custom and the particular constitution-al violation alleged was not "so implausible that the complaint cannot be maintained...." Instead, to sustain a § 1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation--i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury.

Bielevicz v. Dubinon, 915 F.2d 845, 851 (3rd Cir. 1990).

Last year, the Third Circuit again addressed the issue, and left no doubt as to the rule. In rejecting the argument that

deliberate indifference could not be directed toward a class of detainees, they stated:

> I think that the basic standard that must be applied in determining whether the City breached a constitutional duty toward intoxicated and potentially suicidal detainees by means of a municipal policy or custom is that which plaintiff has attempted to meet: whether the City was deliberately indifferent to the serious medical needs of this class of detainees.

Simmons v. City of Philadelphia, 947 F.2d 1042, 1068 (3rd Cir. 1991). In response to the argument that plaintiff did not show the City deliberately indifferent to this particular inmate's rights, they went on to say:

> This argument, however, misses the mark. Plaintiff's contention is not that the City showed deliberate indifference toward Simmons individually. Plaintiff, rather, sought to establish

at trial that the City showed deliberate indifference toward the class of intoxicated and potentially suicidal pretrial detainees to which Simmons belonged and that this deliberate indifference toward the class caused a constitutional injury to Simmons individually.

Simmons v. City of Philadelphia, 947 F.2d 1042, 1070 (3rd Cir. 1991).

While the facts did not justify a holding of liability, the Fifth Circuit has seemingly embraced a similar standard as the Third Circuit. They recently stated:

"In Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182 (5th Cir. 1986), we recognized that, in a Fed. R.Civ.P. 12(b)(6) setting, just as deliberate indiffer-ence to a pretrial detainee's serious physical medical needs may constitute a due process violation, so too may fail-ure to take the steps necessary to protect against a

> detainee's suicidal tendencies. Under Partridge, there-fore, municipal liability may be premised on a policy or custom that fairly may be said to have been the cause of or a significant contributing factor to a suicide.

Burns v. City of Galveston, Tx., 905 F.2d 100, 103 (5th Cir. 1990).

Petitioners sub judice contend in addition to particularized knowledge, a deliberate indifference to the class of suicidal persons put into these "side cells" without taking corrective action to cure the defect is sufficient evidence to deny the summary judgment. The deceased, Richard Boggs, was being housed in a "side cell" on the second floor of the Troup County Jail. There were three such cells on the second floor, plus a fourth cell that had been converted to a recreation/shower area. In these side cells was a combination toilet wash basin unit that stood directly beneath an exposed sewerage pipe from the toilet on

the third floor. On two occasions prior to the death of Richard Boggs this pipe had been used as a gallows to attach torn bed sheets, while the wash basin was a stepping stool to permit jumping off. One prior successful suicide occurred in this identical manner, and one unsuccessful suicide occurred in this manner. A third suicide was successful in the converted side cell using an exposed pipe over the shower. These cells were designed to hold only one or two persons, and were the only cells in the jail that were not equipped with electronic monitoring. At some time after the first several hangings, Sheriff Jones discussed covering the exposed pipes with his chief deputy, but they decided it would be too expensive to make the repairs. No quotes for the repairs were ever sought. Boggs was being housed by himself in this cell at the time of his death.

Petitioner contended in the District Court and the Court of Appeals that the prior three hangings or attempted hangings in the

same or similar cells, coupled with the failure of the Sheriff to rectify the known dangerous condition was evidence of deliberate indifference to the rights of the deceased which proximately lead to his suicide in a like manner. This was despite the fact that the deceased showed no particular propensity for suicide until just minutes before his death.

Petitioners contend that the county cannot maintain a known dangerous condition that has served as a gallows on three prior occasions and refuse to correct that condition, and then contend they should be absolved of any liability from a fourth death by saying that we did not know that the deceased was suicidal. The gallows was going to be used by someone again. The only question was, "Which detainee would be next?" Under these circumstances, the inaction of the county is the "policy or pattern" that lead to the death. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

As the Eight Circuit recently recognized, jailers should learn from their failures. While it is not fair to judge them by hindsight on their first failure, they certainly should learn from that failure and correct the problem. Rellergert v. Cape Girardeau County, MO, 924 F.2d 794, 796 (8th Cir. 1991).

Troup County had several alternatives. They could have stopped housing inmates in the few side cells in the jail. They could have installed camera monitors as they did in the remainder of the jail. They also could have set out to block off the exposed pipes to minimize the suicide risk. They chose to do nothing. Had they chosen any one of the alternatives other than inaction, Petitioners' decedent would likely be alive today.

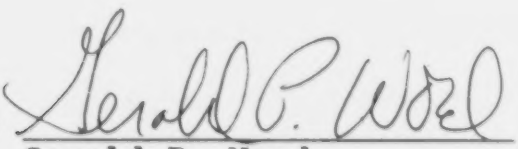
Finally, the policy must have been established by one in authority to do so. In this case, Sheriff Jones considered the problem and decided not to take any action.

"[W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). Sheriff Jones has never contended that he was not the final policymaker for the county on operation of the jail. (Deposition Eugene Jones, p. 28).

WHEREFORE, Petitioner prays that a Writ of Certiorari issue to review the erroneous decision of the Court of Appeals for the Eleventh Circuit and to correct the errors committed by the District Court.

Respectfully submitted,

WORD & FLINN

BY: 

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CERTIFICATE OF COUNSEL

GEORGIA, CARROLL COUNTY:

I, Gerald P. Word, Counsel for Heather Boggs, et. al., Applicant for Certiorari, do hereby certify that I believe that this case is one which is contemplated by the rules of this Court pertaining to Certiorari, and that it does not fall within the class of those cases prohibited by the rules of this Court.

This the 2nd day of June, 1992.

Respectfully submitted,

WORD & FLINN

BY: Gerald P. Word
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APPENDIX A

ELEVENTH CIRCUIT OPINION DATED

APRIL 21, 1992

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 91-8701

D. C. Docket No. 3:89-CV-82-GET

HEATHER LEIGH BOGGS and MISTY LEIGHANN BOGGS, b/n/f DIANNE BOGGS ARRINGTON and RICHARD D. BOGGS, b/n/f SARAH A. CRITCHER

Plaintiffs-Appellants,

versus

ELTON EUGENE JONES, Sheriff of Troup County, Georgia, et. al.

Defendants-Appellees

HAWLEY SMITH, Chairman,

Defendant.

Appeal from the United States District Court for the Northern District of Georgia

---

(April 21, 1992)

Before ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

---

*Honorable George C. Young, Senior U. S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Two issues are raised on this appeal. First Appellants assert that the district court erred in granting the joint motions of Defendants Elton Eugene Jones, Shane Morris, and Troup County for summary judgment and to dismiss civil rights and pendent state law claims filed by Plaintiffs. We agree with the district court's entry of judgment on behalf of Troup County, Georgia, and the County Sheriff, Elton Eugene Jones.[1] We

---

[1]We agree with the result but not the basis cited by the district court, which found the complaint deficient because a violation of the Eighth Amendment, rather than the Fourteenth Amendment, was claimed. The undisputed facts show the absence of any policy or pattern which could establish section 1983 liability on the County or on the Sheriff in his official capacity. See Monell v. Dept. of Social Services, 436 U.S. 658 (1978); Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990). Further, there was no deliberate indifference shown on the

reverse, however, as to Shane Morris, Jailer of Troup County.

"In a prisoner suicide case, to prevail under section 1983 [of Title 42, United States Code] for violation of substantive rights, a plaintiff must show that the jail official displayed 'deliberate indifference' to the prisoner's taking of his own life." Edwards v. Gilbert, 867 F.2d 1271, 1274 (11th Cir. 1989). Once the defense of qualified immunity is asserted, the plaintiff must also convince the court that the law was clearly established that the defendant's alleged conduct constituted "deliberate indifference." Id. at 12 75; Schmelz v. Monroe County, ____ F.2d ____ (11th Cir., Fed. 19, 1992).

---

part of the Sheriff because Plaintiffs failed to present any evidence suggesting that the Sheriff should have been aware that Boggs was a suicide risk. Id.

We must first determine whether the asserted right was clearly established.[2] In Estelle v. Gamble, 429 U. S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court concluded that deliberate indifference to a prisoner's medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment. although Estelle involved medical rather than psychiatric care, in Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990), a prisoner suicide case, this Court rejected that distinction and held that, under Estelle and subsequent cases, reasonable prison officials would have known in 1985 that providing an inmate with inadequate psychiatric care could violate the inmate's Eighth Amendment right not to e subject to cruel and unusual punishment.

---

[2]Because the district court judge did not address the issue of qualified immunity, the order appealed from contains no discussion of the what the clearly established law was at the time of Boggs' suicide. Since the application of qualified immunity is a matter of law which we review de novo, we need not remand to obtain the district court's decision on qualified immunity.

Although pre-trial detainees cannot be punished because they have not been convicted, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the due process rights of a pre-trial detainees are at least as great as the Eighth Amendment protections available to a convicted prisoner. Revere v. Massachusetts General Hospital, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). We think it indisputable that, at the time of Boggs' death in 1988, the law was clearly established that a jail official who recklessly ignores or acts so as to encourage the self-infliction of harm by a suicidal pre-trial detainee could violate the constitutional rights of that detainee.

Having determined that the asserted right was clearly established at the time of Boggs' suicide, we must analyze the facts as alleged by Plaintiffs and supported by the record, viewing such facts in the light favoring Plaintiffs. At this posture, therefore, we must accept as true the

affidavit testimony filed by Plaintiffs that a fellow inmate heard Boggs inform a person the inmate believed to be Morris that Boggs would kill himself if he was not removed from his isolation cell, and that Boggs was told to "go ahead and just hang himself." Under these circumstances, the record demonstrates an issue of material fact as to whether Morris displayed "deliberate indifference" to Boggs' taking of his own life. Thus, Morris may not avail himself of the shield of qualified immunity against such a claim.

Appellants also maintain on appeal that the district court erred in refusing to grant leave to amend their complaint. We conclude that the District Court did not abuse its discretion in this regard, except that upon remand Plaintiffs should be allowed to proceed against Defendant Morris on the basis of an alleged violation of the Fourteenth Amendment rather than the Eighth Amendment violation, which was initially pled.

Accordingly, we affirm the judgment of the district court as to Troup County and Jones, including the dismissal of the pendent state claims; we reverse the judgment of the district court and remand for trial as to Shane Morris.

AFFIRMED in part, **REVERSED** in part, and **REMANDED.**

APPENDIX B

DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

JULY 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

HEATHER LEIGH BOGGS and MISTY LEIGHANN BOGGS, by next fried DIANE BOGGS ARRINGTON and RICHARD D. BOGGS, b/n/f SARA A. CRITCHER,	:	CASE NO. 3:89-cv-82-GET
-vs-	:	
ELTON EUGENE JONES, Sheriff of Troup County, Georgia, TROUP COUNTY, GEORGIA, SHANE MORRIS, Jailer of Troup County; HAWLEY SMITH, Chairman; C. FRANK TAYLOR, Commissioner; BOBBY GUY, Commissioner; RICHARD ENGLISH, Commissioner; MARVIN JONES, Commissioner; and JOHN DOE, Jailer,	:	

ORDER

The above-styled matter is before the court on Elton Jones, Troup County, Georgia and Shane Morris' ("defendants"_ joint motion for summary judgment and to dismiss.

Plaintiffs filed the instant suit seeking to recover for the wrongful death of Richard Lee Boggs who committed suicide, while incarcerated in the Troup County Jail.

On June 23, 1988, an arrest warrant was issued by the Magistrate's Court of Troup

County, Georgia, for Richard Lee Boggs for the murder of Charles Jacks. The same day the warrant was issued, Boggs was arrested and "booked into" the Troup County Jail.

On July 6, 1988, while incarcerated in the jail, Boggs committed suicide by hanging himself. As of the date of his death, Boggs has not been indicted for the murder of Mr. Jacks.

Plaintiffs, children of the decedent, filed suit pursuant to 42 U.S.C. § 1983 alleging that defendants subjected Boggs to "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution by failing to correct a known dangerous condition. Plaintiffs also asserted pendent state law claims for nuisance and negligence.

Defendants move to dismiss plaintiffs' civil rights claim on the grounds that plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs are not entitled to recover on their civil rights

claim because the cruel and unusual punishment protections of the Eighth Amendment did not apply to Boggs. See Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 1410 (1977).

In response, plaintiffs assert:

> While it is true that plaintiffs...complaint specifically alleged an Eighth Amendment violation, the substance of the complaint...sets out a claim under a Fourteenth Amendment theory.

Plaintiffs' response is meritless. Plaintiffs complaint does not raise a Fourteenth Amendment theory. Plaintiffs moved to amend their second amended complaint by adding a Fourteenth Amendment claim and the court denied that motion on June 2, 1991.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' civil rights claim.

Defendants also move the court to dismiss plaintiffs' pendent state law claims for lack of jurisdiction. Other than pendent jurisdiction, plaintiff has not identified

any authority establishing jurisdiction over the pendent state law claim. It is within the court's discretion to exercise jurisdiction over the pendent state law claim once plaintiffs' federal claims have been dismissed. See Ortega v. Schramm, 922 F.2d 684, 688 (11th Cir. 1991). Accordingly, the court declines to exercise jurisdiction over the pendent state law claim and plaintiffs' state law claims are DISMISSED.

Summary

Plaintiffs' claim against defendants, Elton Jones, Troup County, Georgia, and Shane Morris, are DISMISSED.

SO ORDERED, this 18th day of July, 1991.

G. Ernest Tidwell
Judge, United States District Court

(2)

No. 91-1997

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

HEATHER LEIGH BOGGS and
MISTY LEIGHANN BOGGS
b/n/f DIANE BOGGS ARRINGTON and
RICHARD D. BOGGS b/n/f SARA A. CRITCHER,

Petitioners,

vs.

ELTON EUGENE JONES,
Sheriff of Troup County, Georgia,
and TROUP COUNTY, GEORGIA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the failure to remove or cover a pipe which previously had been used by an inmate to commit suicide, uncoupled with any knowledge of a subsequent inmate's suicidal intentions, constitutes deliberate indifference as to the subsequent inmate in violation of the Fourteenth Amendment.

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OPINIONS BELOW

Petitioners have provided the decision of the United States Court of Appeals for the Eleventh Circuit in *Boggs v. Jones*, No. 91-8701, slip op. (11th Cir., April 21, 1992), and have provided the Order of the Honorable G. Ernest Tidwell, Judge, United States District Court for the Northern District of Georgia, entered on July 22, 1991 as Appendix A and Appendix B, respectively, to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents do not disagree with the first paragraph of petitioners' statement of jurisdiction.

As to the second paragraph, respondents disagree that there is "a split of authority among the circuits" or that "an important question of federal law" is involved in these proceedings. However, respondents show that jurisdiction is conferred by 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondents agree that this action involves the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983 but deny owing any liability to petitioners thereunder.

STATEMENT OF THE CASE

Petitioners in these proceedings were the plaintiffs in the district court, Heather Leigh Boggs, Misty Leighann Boggs and Richard D. Boggs. The three petitioners, who bring the underlying action by next friend, are the minor children of Richard Lee Boggs (hereinafter alternately referred to as "the deceased" or "Boggs"). Elton Eugene Jones, the Sheriff of Troup County, Georgia, and Troup County, Georgia are respondents herein. Shane Morris, the third defendant in the district court proceedings, is not a party to these proceedings, as petitioners do not complain of the Eleventh Circuit's ruling as applied to him.

Heather Leigh Boggs and Misty Leighann Boggs, by their next friend Diane Boggs Bowen [now Arrington], instituted this action on July 3, 1989. (R-1.) In their original Complaint, petitioners alleged a dangerous condition existed in the Troup County Jail which was conducive to hangings and claimed the alleged dangerous condition and the death of their father constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (R-1, ¶¶9 and 10.) Consequently, these petitioners brought suit under 42 U.S.C. §1983 for the death of the deceased and sought to bring pendent state law claims alleging wrongful death, nuisance, and negligence.

Prior to the filing of responsive pleadings, a Recast Complaint was filed, which served only to drop certain parties defendant. (R-2.)

Through a Social Security Administration proceeding, it came to the attention of the parties that Deborah

Ogles McCormick had claimed to be the common law wife of the deceased and had claimed that petitioner Richard D. Boggs was the son of the deceased. (R-12.) Consequently, a joint motion for the joinder of Deborah Ogles McCormick and Richard D. Boggs was filed on January 17, 1990 on the basis that complete relief could not be accorded among the existing parties without a determination as to the relationships between Ms. McCormick, Richard D. Boggs, and the deceased.

The Rule 19 Motion was granted on February 17, 1990, and on February 5, 1990, Heather and Misty Boggs, by their next friend Diane Boggs Bowen, filed their Second Recast Complaint, in which they added as parties defendant Richard D. Boggs and Deborah Ogles McCormick. (R-13; R-15.) The claims against Sheriff Jones, Troup County and Shane Morris did not change from those asserted in the original Complaint, but a new claim was asserted seeking a determination as to whether Richard D. Boggs was the minor child of the deceased and whether Deborah Ogles McCormick was the wife of the deceased. Deborah Ogles McCormick did not respond to the Second Recast Complaint served upon her, and a default judgment was entered against her on July 19, 1990. (R-25.)

By Consent Order filed December 10, 1990, the parties were realigned so that Richard D. Boggs became a plaintiff by his next friend Sara A. Critcher. (R-29.) Again, no new or additional claims were asserted against Sheriff Jones, Troup County or Shane Morris by virtue of the Consent Order.

For more than twenty-one (21) months, the parties engaged in written and deposition discovery as to the claims set forth in the original Complaint, the Recast Complaint and the Second Recast Complaint. On April 15, 1991, the very day on which discovery, as extended, ended in this case and more than twenty-one (21) months and two Recast Complaints after the filing of the original Complaint, petitioners served their motion for leave to file yet a Third Amended Complaint and to add, *inter alia*, a claim for violation of due process under the Fourteenth Amendment to the Constitution of the United States. (R-35.)

Defendants below opposed the motion for leave to amend (R-40), and on May 6, 1991, filed their Motion for Summary Judgment. (R-42.) Petitioners filed their Brief in Response to the Motion for Summary Judgment on May 28, 1991. (R-45.) Defendants' Reply Brief and Objection to the Affidavit of Anthony Lollis were filed on June 17, 1991. (R-47.)

The district court's Order denying the motion for leave to amend was entered on or about July 2, 1991. (R-48.) On July 18, 1991, the district court granted defendants' Motion for Summary Judgment, and judgment thereon was entered on July 31, 1991. (R-50; R-52.) It was from these two Orders that petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. (R-54.)

On April 21, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's grant of summary judgment as to respondents and rejected

petitioners' argument that, even in the absence of knowledge of an inmate's suicidal intent, the failure to correct an alleged dangerous condition constitutes deliberate indifference as opposed to mere negligence. This is the issue pending before this Court in the Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

On June 23, 1988, the Magistrate's Court of Troup County issued a warrant for the arrest of Richard Lee Boggs for the murder of Charlie Wayne Jacks. (R-42, Affidavit of Sheriff Elton Eugene Jones, ¶2 [hereinafter "Jones Affidavit"].) Pursuant to the arrest warrant, Boggs was arrested and booked into the Troup County Jail on the same date. (*Id.* at ¶3.)

Throughout the period of detention in question, Boggs' actions gave no indication that he suffered from mental problems or harbored suicidal tendencies. Indeed, petitioners do not contend that respondent Jones had any knowledge that Boggs was a suicide risk. (Petition for Writ of Certiorari, p. 22.)

On July 6, 1988, almost two weeks after his incarceration, Richard Lee Boggs died in the Troup County Jail. (R-42, Jones Affidavit, ¶12.) On that date, Boggs had not been indicted for the murder of Charlie Wayne Jacks but was being held in the Troup County Jail pursuant to the arrest warrant. (*Id.* at ¶13; R-46, Deposition of Elton Eugene Jones, p. 34.)

Prior to the death of Boggs, neither Sheriff Jones nor any other personnel of the Troup County Sheriff's Department was told or otherwise on notice of any mental problems, past suicide attempts or present suicidal intentions on the part of Boggs. (R-42, Jones Affidavit, ¶¶14 and 15.) This was true both as to the period of incarceration during which Boggs died, as well as his previous detention in the Troup County Jail. (*Id.* at ¶¶14-16.) Additionally, prior to that time, Morris had no knowledge of any prior hangings in the Troup County Jail. (R-46, Morris Deposition, pp. 31-32.)

RESPONDENTS' ARGUMENT AGAINST THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.

Despite petitioners' assertions to the contrary, there are no compelling reasons to justify the granting of a Writ of Certiorari with regard to the opinion of the United States Court of Appeals for the Eleventh Circuit in *Boggs v. Jones*, No. 91-8701, slip op. (11th Cir., April 21, 1992) [hereinafter "Boggs Appellate Decision"]. The Boggs Appellate Decision is not in conflict with the decisions of the various circuit courts of appeal. Moreover, as will be discussed below, the Boggs Appellate Decision is not in conflict with the decisions cited by petitioners in support of their reasons for granting the writ of certiorari.

Petitioners first argue, at pages 16-20 of their Petition, that there is a split among the circuits as to whether a failure to correct a dangerous condition of confinement, without more, constitutes mere negligence or deliberate indifference. Petitioners contend that the Third Circuit comes down in favor of a finding of deliberate indifference, while the Sixth, Eighth and Eleventh Circuits hold such conduct to be, at most, negligence. Contrary to petitioners' arguments, however, the two cases they cite, *Colburn v. Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), and *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990), as well as other Third Circuit cases, do not depart from the holdings of other circuits that such conduct constitutes, at most, negligence. Indeed, the Third Circuit has *followed* the precedent of other circuits, including the Eleventh Circuit.

For example, in *Colburn*, the decedent, who was visibly intoxicated, was searched and placed into a jail cell. Approximately four hours later, the decedent shot herself with a handgun. Plaintiff alleged that defendants were negligent and/or reckless in searching the deceased and

that they had exhibited a custom of laxity regarding the supervision and monitoring of jail cells and in searching individuals taken into police custody. *Colburn*, 838 F.2d at 665.

Notably, in *Colburn*, as opposed to the instant proceedings, it was alleged that the defendants knew or had reason to know from their observation that the decedent was a suicide risk.

> Of course, we agree that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

Colburn, 838 F.2d at 669.

Because the motion on review by the Third Circuit in *Colburn* was a motion to dismiss, the court was called upon only to rule upon the sufficiency of the Complaint. The court was reluctant at that stage of the proceedings to state that the Complaint could not be maintained, even though it recognized that "it may be difficult for plaintiff to prove the 'nexus' between the policy (inadequate monitoring of jail cells) . . . and the infringement of constitutional rights." *Id.* at p. 672.

The *Colburn* case made its way to the Third Circuit a second time, after the district court subsequently granted defendants' motion for summary judgment. *Colburn v. Upper Darby TP.*, 946 F.2d 1017 (3rd Cir. 1991) [hereinafter

referred to as "*Colburn II*"]. In affirming the grant of summary judgment, the Third Circuit first noted that:

> . . . a plaintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a "particular vulnerability to suicide," (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers "acted with reckless indifference" to the detainee's particular vulnerability.

Colburn II, 946 F.2d at 1023

As to the first element, the court noted that neither due process nor the Eighth Amendment imposes liability for a negligent failure to protect a detainee from self-inflicted injury.

> Instead, the requirement of reckless or deliberate indifference implies that there must be a "strong likelihood rather than a mere possibility that self-inflicted harm will occur." *See, e.g., Torraco v. Maloney*, 923 F.2d 231, 236 (1st Cir. 1991); *Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990).

Colburn II at 1024. Consequently, rather than being at odds with the holdings of the Eleventh Circuit, as petitioners would have this Court believe, *Colburn* and *Colburn II* actually are in harmony with, and find support in, Eleventh Circuit case law.

The second case cited by petitioners in support of the proposition that the simple failure to correct what is arguably a defect can, without more, amount to deliberate indifference, *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990), is entirely inapposite. In *Bielevicz*, plaintiffs who

had been arrested for public intoxication, complained of an unconstitutional policy and practice of the City of Pittsburgh of arresting people on pretextual charges of public drunkenness, locking them up for several hours, and releasing them without making charges or holding a hearing. This case has nothing whatsoever to do with conditions of confinement or with suicide.

Petitioners' second argument in favor of the granting of the writ of certiorari is that, while respondents may not have known of Boggs' suicidal intent, they nevertheless owed a duty to a class of potential suicide victims. Petitioners assert that the Third Circuit and, possibly, the Fifth Circuit endorse such a view, which they claim is in conflict with opinions of the First, Fourth, Sixth, Eighth and Eleventh Circuits. Such simply is not the case.

Petitioners rely on the Third Circuit's opinions in *Colburn* and *Bielevicz* to support their claim that generalized indifference to a class of potential suicide victims violates the Fourteenth Amendment. However, neither *Colburn* nor *Bielevicz*, which has nothing to do with jail suicide, support such a proposition. In fact, in *Colburn II*, the "class" argument specifically was *rejected*. *Colburn II*, 946 F.2d at 1028-29.

The next case relied on by petitioners in support of their "class" theory, *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3rd Cir. 1991), involved an individual, Simmons, taken into protective custody for public intoxication. On arrival at the jail, Simmons was upset and crying, confused, and deeply concerned about his arrest and its consequences. Simmons was placed alone in a cell and found approximately one and one-half hours later

hanging from the bars of the cell from a noose he had made from his own trousers.

In the ensuing civil rights complaint, plaintiff complained of deliberate indifference to the serious medical needs of intoxicated detainees and of failure to train officers responsible for intoxicated detainees in suicide detection and prevention. As stated above, these issues are not present in this litigation.[1]

Lastly, petitioners suggest that the Fifth Circuit has embraced the concept of a duty owed toward a class of suicidal inmates and cite as support *Burns v. City of Galveston, Texas*, 905 F.2d 100 (5th Cir. 1990). In that case, the deceased was arrested for public intoxication, whereupon he became belligerent. His conduct was considered typical of an intoxicated detainee, but not reflective of mental illness or suicidal tendencies. Shortly after having been placed in a cell, the deceased yelled that if he did not get a cigarette he would kill himself. Thereafter, he continued to beat on the walls and to yell at the officers

---

[1] Indeed, based on this Court's ruling in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), the Third Circuit noted that in order to establish that the city was deliberately indifferent, plaintiff must have adduced scienter-like evidence of the deliberate indifference of specific policy makers. *Simmons*, 947 F.2d at 1064, n.20. Moreover, the court also reiterated that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide but that the Fourteenth Amendment imposes on individuals who know or should know of the particular vulnerability to suicide of an inmate an obligation not to act with reckless indifference to that vulnerability. *Id.* at 1068, n.23.

to bring a cigarette to him. Within an hour after having been placed in the cell, the deceased was found hanging.

The plaintiff, the mother of the deceased, brought her civil rights action alleging that the city had a custom of deliberate indifference toward the medical needs of suicidal detainees and a policy of inadequately training its officers in its medical procedures. On motion for summary judgment, the district court dismissed the federal claim.

In affirming the grant of summary judgment, the Fifth Circuit focused on the needs of the individual detainee.

> It is one thing to require a municipality to train its police officers to recognize and not ignore obvious medical needs of detainees with known, demonstrable and serious mental disorders. It is quite another to require as a constitutional minimum that a municipality train its officers to medically screen each pretrial detainee so that the officers will unerringly detect suicidal tendencies.

Burns, 905 F.2d at 104. Thus, the Fifth Circuit's holding in *Burns* does not support petitioners' contention that the Fourteenth Amendment imposes a duty on jail officials as to a class of inmates as opposed to individual inmates. Consequently, *Burns* also is not in conflict with the holdings of other circuits on this point.

Rule 10 of the Rules of the Supreme Court of the United States does not mandate certiorari in all cases. Rule 10 merely states that "[a] petition for writ of certiorari will be granted only when there are special and

important reasons therefor." Petitioners herein have demonstrated no special or important reasons for the granting of the petition for a writ of certiorari. Contrary to petitioners' assertions, the Boggs Appellate Decision is not in conflict with the decisions of other circuits. Accordingly, the petition for writ of certiorari should be denied.

DISCUSSION

NEITHER RESPONDENT WAS DELIBERATELY INDIFFERENT TO ANY SERIOUS MEDICAL NEED OF THE DECEASED; THUS, THE GRANT OF SUMMARY JUDGMENT WAS APPROPRIATE

A. Elton Eugene Jones is Not Liable in His Individual Capacity

The evidence is uncontroverted that respondent Jones had no actual knowledge of the decreased's ever having exhibited any suicidal tendencies. (R-42, Jones Affidavit ¶¶14 through 16; Petition for Writ of Certiorari, p. 22.) Nevertheless, petitioners contend that he violated the deceased's Fourteenth Amendment rights simply because 1) there had been prior hangings from exposed pipes in the Troup County Jail,[2] and 2) he had failed to

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[2] Petitioners misstate the facts when they assert that Boggs' death "was the fourth in a series of deaths by hanging between 1985 and 1988." (Petition for Writ of Certiorari, p. 9.) They also misstate the facts when they assert that there were "three prior hangings or attempted hangings in a same or similar manner." (*Id.* at p. 16.) Indeed, as petitioners finally concede, there was only *one* prior death by hanging in the same or similar manner at the Troup County Jail. (*Id.* at p. 30.)

cover the pipes to ensure that inmates could not use them as a means of committing suicide. (Petition for Writ of Certiorari, pp. 30-31.) The case law is clear – this alone does not rise to the level of "deliberate indifference" required to support a Fourteenth Amendment claim against Jones in his individual capacity. There is no split of authority among the circuits on this issue.

In the case of *Popham v. City of Talladega*, 908 F.2d 1561 (11th Cir. 1990), the Eleventh Circuit affirmed the district court's grant of defendants' summary judgment motion in a case involving the jail suicide of the plaintiff's husband. In so doing, the court noted that in the context of jail suicides, an allegation of deliberate indifference must be considered in light of the knowledge possessed by the officials involved as to the inmate's suicidal tendencies. *Popham*, 908 F.2d at 1564. The Court further recognized that "[a]bsent knowledge of a detainee's suicidal tendencies, the cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference." *Id.*

Judge Hall of the Northern District of Georgia, in *McDay v. City of Atlanta*, 740 F.Supp. 852 (N.D. Ga. 1990), *affirmed*, 927 F.2d 614 (11th Cir. 1991), also found in favor of the defendants in a jail suicide case where defendants had never known the deceased to attempt or threaten to commit suicide and noted "courts have typically required that defendants have knowledge that the detainee was a suicide risk before they can be charged with deliberate indifference." *McDay*, 740 F.Supp. at 857.

Moreover, the Eleventh Circuit in *Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989) reversed the district court's

denial of defendants' motion for summary judgment and stated:

> In the absence of a previous threat of or an earlier attempt at suicide, we know of no federal court in the nation or any other court within this circuit that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference.

Edwards v. Gilbert, 867 F.2d at 1275 (11th Cir. 1989). *See also Schmelz v. Monroe County*, 954 F.2d 1540, 1544-45 (11th Cir. 1992); *Colburn v. Upper Darby TP.*, 946 F.2d 1017, 1023-24 (3rd Cir. 1991) (affirming grant of summary judgment to defendants); *Bell v. Stigers*, 937 F.2d 1340, 1343 (8th Cir. 1991) (reversing district court's denial of summary judgment); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (reversing district court's denial of defendants' motion for summary judgment); *Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458 (3rd Cir. 1989) (affirming grant of summary judgment to defendants); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (reversing denial of defendants' summary judgment motion); *Estate of Cartwright v. City of Concord, California*, 856 F.2d 1437 (9th Cir. 1988) (affirming judgment for defendants).

To accept petitioners' view of what constitutes a Fourteenth Amendment violation would mean that an inmate has an *absolute right* to be protected from committing suicide or from other types of harm while incarcerated, regardless of whether the officers had reason to know that such harm was likely to occur. There is no such right under the United States Constitution.

For example, in *Belcher v. Oliver, supra,* a pre-trial detainee hanged himself with his belt while detained at the city jail on charges of public intoxication and hazardous driving. The jail officials failed to remove the detainee's belt and shoes from him before placing him in the cell, in violation of the jail's normal procedure to do so. Nevertheless, there was no deliberate indifference and no constitutional violation found to occur because the officials had no reason to suspect the detainee was a suicide risk.

> Plaintiff's theory of this case would result in an absolute right to be protected from committing suicide or from other sorts of harm while incarcerated, regardless of whether the officers had reason to know that such harm was likely to occur. The Eighth and Fourteenth Amendments do not contemplate liability upon the premise that all self-inflicted harm is someone else's fault. . . . That arguably negligent actions do not support a claim for cruel and unusual punishment is consistent with the purpose of the Eighth Amendment – to prohibit inhumane methods of punishment and assure appropriate standards of decency in a setting of detention. . . . We do not for one moment dismiss the pain of these events for those involved. We hold only that their tragic character cannot be ameliorated by efforts to affix constitutional blame where it does not belong.

Belcher v. Oliver, 898 F.2d at 36 (citations omitted).

Furthermore, in *Freedman v. City of Allentown, Pennsylvania,* 853 F.2d 1111, 1115 (3rd Cir. 1988), the court affirmed the dismissal of the complaint of the parent of an inmate whose son had committed suicide while

detained in jail. In *Freedman*, unlike the case before this Court, there were indications the inmate had suicidal tendencies, but the police officers were, at most, negligent in failing to recognize them. *Id.* at 1116. Relying on *Hudson v. Palmer*, 468 U.S. 517 (1974), the Third Circuit recognized that "a prison custodian is not the guarantor of a prisoner's safety" and refused to "infer from the prisoner's act of suicide itself that the prison officials . . . recklessly disregarded their obligation to take reasonable precautions to protect the safety of prisoners entrusted to their care." *Freedman*, 853 F.2d at 1115. *Accord, Gagne v. City of Galveston*, 805 F.2d 558, 559 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987) ("the arresting officer was not under a clearly established constitutional duty to discover the prisoner's suicidal tendencies *or to deprive him of the means of killing himself*") (emphasis supplied).

While others may have committed suicide in the Troup County Jail prior to the death of Boggs, that fact alone is not enough to sustain petitioners' claim against respondent Jones individually. Consequently, he is entitled to summary judgment on plaintiffs' §1983 claim.

B. Elton Eugene Jones is Entitled to Qualified Immunity

Respondents submit it was objectively reasonable for Jones to believe his actions did not violate any clearly established right of the deceased. As stated in *Anderson v. Creighton*, 483 U.S. 635 (1987):

> It should not be surprising, therefore, that our cases establish that the right the official is

> alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. at 640.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court adopted an objective test, susceptible to summary judgment disposition. As the law presently exists, unless it can be established by objective evidence that the defendant violated the deceased's "clearly established constitutional rights," then the defendant generally is entitled to summary judgment on the basis of qualified immunity.

In *Edwards v. Gilbert,* 867 F.2d 1271 (11th Cir. 1989), an inmate who had never threatened or attempted suicide and who had never been considered a suicide risk, was left in a secure cell for forty-five (45) minutes during which time he committed suicide. The court concluded a reasonable officer in the defendants' positions could have believed he was acting consistently with the Constitution and directed that summary judgment be entered on the basis of qualified immunity.

The result should be the same here. Jones knew the deceased had been in the Troup County Jail for approximately two (2) weeks prior to the date of his death, during which time he had exhibited no unusual behavior (R-42, Jones' Affidavit, ¶¶14 and 15); the deceased received visits from relatives and acquaintances while he was in the Troup County Jail, none of whom reported any unusual behavior (*Id.*); the deceased informed jail officials he had never been treated for a mental condition

(R-42, Exhibit D to Jones Affidavit); and while detained in the Troup County Jail, the deceased participated in store-call on several dates, *including the date of his death.* (R-42, Exhibit F to Jones Affidavit.)

Furthermore, the deceased had been confined at the Troup County Jail on prior occasions, and during none of those periods of confinement did he indicate to Jones or any jail personnel that he had mental problems, that he had attempted to commit suicide or that he was considering committing suicide. (R-42, Jones Affidavit, ¶16.) On this objective evidence, and the petitioners' admission that Jones did not know of Boggs' suicidal intent (Petition for Writ of Certiorari, p. 22), Jones' actions with respect to the deceased were reasonable and entitle him to summary judgment based on qualified immunity.

C. Neither Elton Eugene Jones in His Official Capacity Nor Troup County, Georgia is Liable to Petitioners

Petitioners assert that Shane Morris, who is not a respondent in this proceeding, knew of Boggs' intent to kill himself. (Petition for Writ of Certiorari, pp. 12-13.) Even assuming there were facts which indicated Morris had knowledge of the deceased's suicidal intentions, summary judgment still was appropriate as to respondents Jones, sued in his official capacity, and Troup County. This is because under §1983, there is no *respondeat superior* liability. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 694-95 (1978). Assuming *arguendo* that Morris violated the deceased's rights under §1983, neither Jones nor Troup County is liable simply

because Morris was employed as a Deputy of the Troup County Sheriff's Department.

"Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694. In this case, petitioners' damages, if any, were not proximately caused by any such policy or custom. They were proximately caused by the acts of the deceased, whose intentions to commit such acts were unknown and unforeseen by these respondents.

Petitioners, however, contend the allegedly wrongful failure of these respondents to cover up certain pipes in the Troup County Jail constitutes a policy or custom on which the liability of Jones in his official capacity and Troup County may be based. Respondents disagree. The decision by Jones not to cover these pipes was made in the sound discretion of one whose job it was to administer the Jail. It is, therefore, no more than a condition of confinement claim. However, the touchstone of any suit alleging constitutional violations as a result of certain conditions of confinement is the notion that "courts are ill-equipped to deal with . . . problems of prison administration. . . . " *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

Thus, prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547

(1979). "[A] court must not substitute its views for those of legislators and jail administrators; [rather] it must limit its inquiry to the issue of whether conditions of confinement violate a prohibition of the Constitution." *Hamm v. DeKalb County*, 774 F.2d 1567, 1571 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

> As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. . . . When a person is institutionalized – and wholly dependent on the State . . . a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.

Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (citations omitted).

As to the scope of those responsibilities, there can be no doubt but that the State must provide adequate food, shelter, clothing, and medical care. It must also provide reasonable safety for all residents and personnel within the institution. *Youngberg*, 457 U.S. at 324. "In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a *presumption of correctness.*" *Id.* (emphasis added). Thus, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323.

There is no such showing here. To the contrary, Jones considered whether or not to cover these pipes, but reasonably concluded the ongoing risk associated therewith outweighed the remote chance an inmate would hang himself from them. Jones considered the possibility of covering the pipes with some kind of wood, some kind of metal, or some kind of plastic. (R-46, Jones Deposition, p. 27.) Since all three of these materials can be used by an inmate to harm himself or to jeopardize the security of the jail, nothing was done about putting a cover over the pipes. (*Id.*) The decision was *not* based, as petitioners contend at p. 30 of the Petition, on a determination that repairs would be too expensive.

The case of *Wayland v. City of Springdale, Arkansas*, 933 F.2d 668 (8th Cir. 1991) is particularly instructive. In that case, an arrestee hanged himself from air vent louvers put to the same use by another inmate less than four years before. Wayland had not displayed any unusual emotions or suicidal tendencies during his stay in jail, but the plaintiff argued that the mere failure to take any corrective actions to modify the air vent and cell environment constituted deliberate indifference in violation of the Fourteenth Amendment. The district court granted summary judgment to defendants and the Eighth Circuit affirmed, noting that the failure to change the air vents could not establish anything other than negligence. Respondents submit that the same result should obtain here.

Finally, in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), this Court recently held that, to show an Eighth Amendment violation for the conditions of confinement, an inmate must show that some governmental official

subjectively acted with deliberate indifference toward the right of the inmate. This Court found no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement. Thus, the standard imposed should be one higher than that of mere negligence. *Daniels v. Williams*, 474 U.S. 327 (1986).

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter, because the justiciable concerns required by Rule 10 of the Rules of the United States Supreme Court are not present. There is no conflict between the circuits. The Eleventh Circuit's analysis is entirely consistent with the established precedent of this Court and of the other courts of appeal.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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